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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 751

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MORTON LIFTIN
818 Eighteenth Street, N. W.
Washington, D. C. 20006

Attorney for Petitioner

[Charge of Conspiracy to Obstruct Justice]

DEMAND FOR BILL OF PARTICULARS, NOVEMBER 15, 1962

Respondent, by his attorneys, RABINOWITZ & BOUDIN, in order adequately to file his Answer and to prepare his defense herein, hereby requests a bill of particulars setting forth the following:

* * *

7. With respect to Paragraph IV, subdivision 4, state the following:

* * *

(d) From whom is it claimed that the respondent conspired to conceal certain payments to Fred Bechtel and others, that is - from a District Attorney, a Grand Jury, a court or otherwise?

* * *

BILL OF PARTICULARS, DECEMBER 5, 1962

Petitioner, without conceding the basis or the authority for the demand in a proceeding of this nature, submits the following for its bill of particulars in response to demand dated November 15, 1962, and served November 19, 1962:

* * *

7. * * *

(d) A District Attorney or representatives thereof and others not presently known to the petitioner.

* * *

[Claim of Violation of Self-Incrimination Privilege]

RESPONDENT'S [PETITIONER HERE] ANSWER TO CHARGES

* * *

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE LIMITED TO PARAGRAPH "IV-"3" and "4" OF THE PETITION:

19. Respondent testified before a Grand Jury with respect to the matters set forth in the said paragraphs. When respondent sought to waive his immunity, permission to do so was refused by the District Attorney on the ground that such waiver could not be given as a matter of law.

20. Respondent submits that the institution of the instant disciplinary proceeding on the basis of the matters set forth in Paragraph "IV", subdivisions "3" and "4", is a violation of his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. * * * (pp. 8-9.)

* * *

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, FEBRUARY 25, 1963

* * *

THE FIFTH AFFIRMATIVE DEFENSE

* * *

24. We pass over the reference to self-incrimination under the Federal Constitution. In all candor, it does not seem to respondent, upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. In this respect, petitioner would be entitled to a grant of its motion limited to striking out the reference to the Federal constitutional privilege against self-incrimination. We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent to amend the answer by adding the words "under the State Constitution and his right to due process of law under the Federal and State Constitutions." * * * (p. 9.)

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPEAL AND AFFIDAVIT, APRIL 22, 1963

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affidavit of Leonard B. Boudin * * * the undersigned will move this Court at a term of the Appellate Division of the Supreme Court of the State of New York, First Department, for an order granting leave to the respondent to appeal to the Court of Appeals from said order of the Appellate Division, First Department, entered on the 21st day of March, 1963 in the Office of the Clerk of the Appellate Division, First Department * * * and for the certificate

of the said Appellate Division certifying the questions of law decisive of the correctness of its determination and that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals, to wit, whether in disciplinary proceedings instituted in the Appellate Division upon a petition of a bar association, the respondent may not assert the following matters in the form of affirmative defenses:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 1-2.)

* * *

AFFIDAVIT

* * *

5. The issues raised by these affirmative defenses are important to the law governing disciplinary proceedings. The questions involve matters * * * of constitutional law (5th affirmative defense) * * *. (p. 2.)

* * *

WHEREFORE, your deponent prays for an order granting respondent leave to appeal to the Court of Appeals upon questions to be certified by this Court as follows:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 3-4.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT, MAY 25, 1966

Before taking up in further detail the findings and rulings of the Referee and the Appellate Division, I shall briefly enumerate the several motions and applications which were made on my behalf prior to, during and after the Referee proceedings, insofar as pertinent to the issues for appeal in this Court: The first item of the aforementioned category which needs to be mentioned is a motion which was commenced by the petitioner Bar Association, and which I unsuccessfully contested, for the striking of affirmative defenses in answer. I refer to the petitioner's motion dated January 8, 1963, supported by affidavit of Michael Franck, Esq., sworn to on the latter date. The affirmative defenses in question appear as paragraphs 6 through 27 of my answer in this disciplinary proceeding. Principally here involved are my Fourth and Sixth affirmative defenses, which pertained to the contempt charges. (pp. 19-20.)

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND DISBARMENT ORDER, June 7, 1966

I respectfully submit this affidavit in [support] * * * of my presently pending motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States viz, whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated, and that the Courts held that they were not.

* * *

[Aiding and Abetting Violation of City Charter]

RESPONDENT'S [PETITIONER HERE] BRIEF IN OPPOSITION TO MOTION TO AFFIRM REFEREE'S REPORT

* * *

In concluding the observations on Charge III, respondent urges that as a matter of law there is no provision in the Charter relating to aiding and abetting the violation of Section 886. Nor does Section 901 refer to such actions. Consequently, this charge against the respondent is created *ad hoc* for this proceeding in the hope that the court will find substance to it. We submit, however, that such *post facto* tailoring does not comport with elementary due process and is a serious distortion of the rights of respondent. No legal or moral wrong existed at the time on respondent's part. Why should one now be created? (p. 18.)

* * *

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT

* * *

The fair meaning of the cases in this State, on the question of burden of proof in disciplinary proceedings against attorneys is, we submit, that the burden is one lying intermediately between the burden applied in a civil forum and that applied in a criminal forum. Although the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here, the decisions reveal that the rule requiring proof of the charges of misconduct by a preponderance of evidence is applied in a distinctively exacting manner, reflecting the solicitude with which Anglo-American jurisdictions have traditionally regarded the right of a licensed attorney or counsellor to pursue his profession

in a proper manner, and the recognized need of protecting attorneys and counsellors against ill-considered or intemperate official charges. * * * (p. 9.)

* * *

We submit that the emphasis in the above cases on the issue of the "intentional" character of an attorney's conduct, and on the need for "clear" or "satisfactory" evidence, bespeaks, as we suggested, the prevalence, in disciplinary proceedings, of a distinctive requirement of judicial proof that it is in a significant degree more exacting than the conventional standard of "preponderance" applied generally in civil cases. (p. 10.)

* * *

* * * To construe the within legislative provisions [Sections 886 and 901] as having placed an attorney on "notice" or "apprisal" that he would be deemed in violation upon making a loan for purely friendship reasons to a City official at a time when the alleged matter of "interest" in "City business" was thus in a dormant condition, is to render those statutes constitutionally void on account of vagueness. Moreover, such a construction and application of the statutes, in regard to the Riverside-Amsterdam item, is also violative of substantive due process in the even more fundamental sense above mentioned, i.e., in that the statutes are thus given a construction and an application which bears no "reasonable relation" to the legitimate legislative object of regulating the conduct of attorneys. (p. 25.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT, May 25, 1966

By motion on my behalf supported by affidavit sworn to April 24, 1963, it was urged that the disciplinary charges be dismissed on the ground that the statutes upon which they were based were constitutionally void

on account of vagueness; and requesting the appointment of an advisory jury under C.P.L.R. 4212. As to the point of statutory vagueness, we urged that, since the Supreme Court of the United States had determined, in affirming my 1960 contempt conviction (375 U.S. 809) that constitutional issues which I raised as to the validity of Judiciary Law §§ 750 and 751 on due process grounds as construed and applied had not been raised in the courts of this State, the within disciplinary proceedings would present for the first time the question of the constitutionality of those statutes. It was also urged in the aforementioned motion that we were entitled to dismissal of the disciplinary proceeding on the ground of due process unconstitutionality (on account of vagueness) of §§ 886 and 901 of the New York City Charter and § 580 (Conspiracy) of the Penal Law as construed and applied herein. * * *.(pp. 21-22.)

* * *

* * * The Referee's finding that I was interested in the Riverside-Amsterdam project (*id.*, pp. 9-17) was arrived at on the basis that, although this project had evidently been approved originally by all officials concerned on an entirely objective and proper basis, and although Mr. Jack's dealings with me in relation to this project had betrayed no impropriety aside from the technical "conflict of interest" impingement deemed to arise from my having given Mr. Jack loan assistance for the renovation of his apartment, and although also there had been a hiatus in the Riverside-Amsterdam project which I contended rendered this subject matter immaterial to Charge III, and which I contend makes the Statute unconstitutional as vague and indefinite, the sheer fact that I had (admittedly) given Mr. Jack the loan-assistance while the Riverside-Amsterdam project continued to be within the purview of my hopes or possible expectancy, was sufficient to sustain Charge III. * * * (p. 27.)